

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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PLUMBERS AND PIPEFITTERS LOCAL	:	Civil Action No. 1:08-cv-04063-JGK
UNION NO. 630 PENSION-ANNUITY	:	
TRUST FUND, Individually and On Behalf of	:	<u>CLASS ACTION</u>
All Others Similarly Situated,	:	
	:	MEMORANDUM IN SUPPORT OF THE
Plaintiff,	:	MOTION OF PLUMBERS AND
	:	PIPEFITTERS LOCAL UNION NO. 630
vs.	:	PENSION-ANNUITY TRUST FUND FOR
	:	APPOINTMENT AS LEAD PLAINTIFF
ARBITRON, INC., et al.,	:	AND FOR APPROVAL OF SELECTION OF
	:	LEAD COUNSEL
Defendants.	:	
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## **I. PRELIMINARY STATEMENT**

Presently pending before this Court is a securities class action lawsuit (the “Action”) brought on behalf of all purchasers of Arbitron, Inc. (“Arbitron” or the “Company”) securities between July 19, 2007 and November 26, 2007, inclusive (the “Class Period”). The Action alleges violations of Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 (“the Exchange Act”), as amended by the Private Securities Litigation Reform Act of 1995 (“PSLRA”) (15 U.S.C. §78) and the Securities and Exchange Commission (“SEC”) Rule 10b-5 promulgated thereunder (17 C.F.R. §240.10b-5).

Institutional Investor Plumbers and Pipefitters Local Union No. 630 Pension-Annuity Trust Fund (“Plumbers and Pipefitters Trust Fund”) hereby moves this Court for an Order to: (i) appoint Plumbers and Pipefitters Trust Fund as Lead Plaintiff in the Action under Section 21D(a)(3)(B) of the Exchange Act; and (ii) approve Plumbers and Pipefitters Trust Fund’s selection of the law firm of Coughlin Stoia Geller Rudman & Robbins LLP (“Coughlin Stoia”) to serve as Lead Counsel.

This motion is made on the grounds that Plumbers and Pipefitters Trust Fund is the most adequate plaintiff, as defined by the PSLRA. Plumbers and Pipefitters Trust Fund is precisely the type of institutional investor that Congress sought to summon and empower when it enacted the PSLRA. *See Ferrari v. Impath, Inc.*, No. 03 Civ. 5667 (DAB), 2004 U.S. Dist. LEXIS 13898, at \*10 (S.D.N.Y. July 15, 2004) (holding that the purpose behind the PSLRA is best achieved by encouraging institutional investors to serve as lead plaintiffs). Moreover, as an institutional investor, Plumbers and Pipefitters Trust Fund is accustomed to acting as a fiduciary and its experience in legal and financial matters will substantially benefit the class.

During the Class Period, Plumbers and Pipefitters Trust Fund incurred a loss of \$5,213.87 on its transactions in Arbitron shares. *See* Alba Decl., Ex. B.<sup>1</sup> To the best of its knowledge, this is the greatest loss sustained by any moving class member or class member group who has brought suit or filed an application to serve as Lead Plaintiff in this Action. In addition, Plumbers and Pipefitters Trust Fund, for the purposes of this motion, adequately satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure in that its claims are typical of the claims of the putative class and that it will fairly and adequately represent the interests of the class.

## **II. FACTUAL BACKGROUND<sup>2</sup>**

The Company, through its subsidiaries, provides media and marketing information services in the United States and internationally. The Company's Portable People Meter ratings service is purportedly capable of measuring radio, broadcast television, cable television, Internet broadcasts, satellite radio and television audiences, and retail store video and audio broadcasts.

The complaint charges Arbitron and certain of its officers and directors with violations of the Exchange Act. The complaint alleges that, during the Class Period, defendants issued materially false and misleading statements that misrepresented and failed to disclose: (i) that the Company's scheduled implementation of its Portable People Meter ratings service in certain major markets was not performing according to internal expectations and the Company was experiencing significant difficulties such that it would have to delay its implementation; and (ii) as a result, defendants lacked a reasonable basis for their positive statements about the timing of the implementation of Arbitron's Portable People Meter ratings service and the Company's prospects and future earnings.

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<sup>1</sup> References to the "Alba Decl., Ex. \_\_\_\_" are to the exhibits attached to the accompanying Declaration of Mario Alba Jr., dated June 30, 2008, and submitted herewith.

<sup>2</sup> These facts are drawn from the allegations in the complaint.

On November 26, 2007, Arbitron announced that “it [would] delay the commercialization of its Portable People Meter (PPM) radio ratings service in nine markets” and that the Company would be revising its financial guidance for 2007 and its outlook for 2008. In response to this announcement, the price of Arbitron common stock declined \$7.21 per share, or over 14.74%, to close at \$41.70 per share, on unusually high trading volume.

### **III. ARGUMENT**

#### **A. Plumbers and Pipefitters Trust Fund Should Be Appointed Lead Plaintiff**

##### **1. The Procedure Required by the PSLRA**

The PSLRA has established a procedure that governs the appointment of a lead plaintiff in “each private action arising under the [Exchange Act] that is brought as a plaintiff class action pursuant to the Federal Rules of Civil Procedure.” 15 U.S.C. §78u-4(a)(1) and (a)(3)(B)(i).

First, the plaintiff who files the initial action must publish a notice to the class, within 20 days of filing the action, informing class members of their right to file a motion for appointment as lead plaintiff. 15 U.S.C. §78u-4(a)(3)(A)(i). Plaintiff caused the first notice regarding the pendency of this Action to be published on *Business Wire*, a national, business-oriented newswire service, on April 30, 2008. *See* Alba Decl., Ex. A. Within 60 days after publication of the notice, any person or group of persons who are members of the proposed class may apply to the Court to be appointed as lead plaintiff, whether or not they have previously filed a complaint in the action. 15 U.S.C. §§78u-4(a)(3)(A) and (B).

Second, the PSLRA provides that, within 90 days after publication of the notice, the Court shall consider any motion made by a class member and shall appoint as lead plaintiff the member or members of the class who the Court determines to be most capable of adequately representing the

interests of class members. *See* 15 U.S.C. §78u-4(a)(3)(B). In determining the “most adequate plaintiff,” the PSLRA provides that:

[T]he court shall adopt a presumption that the most adequate plaintiff in any private action arising under this Act is the person or group of persons that

(aa) has either filed the complaint or made a motion in response to a notice...

(bb) in the determination of the court, has the largest financial interest in the relief sought by the class; and

(cc) otherwise satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure.

15 U.S.C. §78u-4(a)(3)(B)(iii). *See generally Greebel v. FTP Software*, 939 F. Supp. 57, 64 (D. Mass. 1996).

**2. Plumbers and Pipefitters Trust Fund Satisfies the “Lead Plaintiff” Requirements of the Exchange Act**

**a. Plumbers and Pipefitters Trust Fund Has Complied with the Exchange Act and Should Be Appointed Lead Plaintiff**

The time period in which class members may move to be appointed Lead Plaintiff herein under 15 U.S.C. §78u-4(a)(3)(A) and (B) expires on June 30, 2008. Pursuant to the provisions of the PSLRA and within the requisite time frame after publication of the required notice on April 30, 2008, Plumbers and Pipefitters Trust Fund timely moves this Court to be appointed Lead Plaintiff on behalf of all members of the class.

Plumbers and Pipefitters Trust Fund has duly signed and filed a certification stating that it is willing to serve as a representative party on behalf of the class. *See* Alba Decl., Ex. C. In addition, Plumbers and Pipefitters Trust Fund has selected and retained competent counsel to represent itself and the class. *See* Alba Decl., Ex. D. Accordingly, Plumbers and Pipefitters Trust Fund has satisfied the individual requirements of 15 U.S.C. §78u-4(a)(3)(B) and is entitled to have its

application for appointment as Lead Plaintiff and approval of selection of Lead Counsel as set forth herein, considered and approved by the Court.

**b. Plumbers and Pipefitters Trust Fund Is Precisely the Type of Lead Plaintiff Congress Envisioned When it Passed the PSLRA**

The Congressional objective in enacting the lead plaintiff provisions was to encourage large, organized institutional investors to play a more prominent role in securities class actions. *See* H.R. Conf. Rep. No. 104-369, at 34 (1995), reprinted in 1995 U.S.C.C.A.N. 679, 733 (“The Conference Committee believes that increasing the role of institutional investors in class actions will ultimately benefit shareholders and assist courts by improving the quality of representation in securities class actions.”).

Congress reasoned that increasing the role of institutional investors, which typically have a large financial stake in the outcome of the litigation, would be beneficial because institutional investors with a large financial stake are more apt to effectively manage complex securities litigation. Plumbers and Pipefitters Trust Fund, as an institutional investor, is precisely the type of Lead Plaintiff Congress envisioned when it passed the PSLRA. *See id.*

**c. Plumbers and Pipefitters Trust Fund Has the Requisite Financial Interest in the Relief Sought by the Class**

During the Class Period, as evidenced by, among other things, the accompanying signed certification, *see* Alba Decl., Ex. C, Plumbers and Pipefitters Trust Fund incurred a loss of \$5,213.87 on its transactions in Arbitron shares. *See* Alba Decl., Ex. B. Plumbers and Pipefitters Trust Fund thus has a significant financial interest in this case. Therefore, Plumbers and Pipefitters Trust Fund satisfies all of the PSLRA’s prerequisites for appointment as Lead Plaintiff in this Action and should be appointed Lead Plaintiff pursuant to 15 U.S.C. §78u-4(a)(3)(B).

**d. Plumbers and Pipefitters Trust Fund Otherwise Satisfies Rule 23**

According to 15 U.S.C. §78u-4(a)(3)(B), in addition to possessing the largest financial interest in the outcome of the litigation, the lead plaintiff must also “otherwise satisf[y] the requirements of Rule 23 of the Federal Rules of Civil Procedure.” Rule 23(a) provides that a party may serve as a class representative only if the following four requirements are satisfied: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

Of the four prerequisites to class certification, only two – typicality and adequacy – directly address the personal characteristics of the class representative. Consequently, in deciding a motion to serve as lead plaintiff, the Court should limit its inquiry to the typicality and adequacy prongs of Rule 23(a), and defer examination of the remaining requirements until the lead plaintiff moves for class certification. *See Lax v. First Merchants Acceptance Corp.*, No. 97-C-2715 (DHC), 1997 U.S. Dist. LEXIS 11866, at \*20, (N.D. Ill. Aug. 6, 1997). Plumbers and Pipefitters Trust Fund satisfies both the typicality and adequacy requirements of Rule 23, thereby justifying its appointment as Lead Plaintiff.

Under Rule 23(a)(3), the claims or defenses of the representative parties must be typical of those of the class. Typicality exists where the plaintiffs’ claims arise from the same series of events and are based on the same legal theories as the claims of all the class members. *See Rossini v. Ogilvy & Mather, Inc.*, 798 F.2d 590, 598 (2d Cir. 1986). Typicality does not require that there be no factual differences between the class representatives and the class members because it is the generalized nature of the claims asserted which determines whether the class representatives are

typical. *See Sofran v. Labranche & Co.*, 220 F.R.D. 398, 402 (S.D.N.Y. 2004) (“The possibility of factual distinctions between the claims of the named plaintiffs and those of other class members does not destroy typicality, as similarity of legal theory may control even in the face of differences of fact”). The requirement that the proposed class representatives’ claims be typical of the claims of the class does not mean, however, that the claims must be identical. *See Ferrari*, 2004 U.S. Dist. LEXIS 13898, at \*18.

Plumbers and Pipefitters Trust Fund satisfies this requirement because, just like all other class members, it: (1) purchased Arbitron shares during the Class Period; (2) was adversely affected by defendants’ false and misleading statements; and (3) suffered damages as a result thereof. Thus, Plumbers and Pipefitters Trust Fund’s claims are typical of those of other class members since its claims and the claims of other class members arise out of the same course of events.

Under Rule 23(a)(4), the representative parties must also “fairly and adequately protect the interests of the class.” The PSLRA directs this Court to limit its inquiry regarding the adequacy of Plumbers and Pipefitters Trust Fund to represent the class to the existence of any conflicts between the interest of Plumbers and Pipefitters Trust Fund and the members of the class. The Court must evaluate adequacy of representation by considering: (i) whether the class representatives’ claims conflict with those of the class; and (ii) whether class counsel is qualified, experienced, and generally able to conduct the litigation. *See In re Global Crossing Sec. & ERISA Litig.*, No. 02 MD 1472 (GEL), 2004 U.S. Dist. LEXIS 23946, at \*53 (S.D.N.Y. Nov. 23, 2004).

Here, Plumbers and Pipefitters Trust Fund is an adequate representative of the class. As evidenced by the injuries suffered by Plumbers and Pipefitters Trust Fund and the class, the interests of Plumbers and Pipefitters Trust Fund are clearly aligned with the members of the class, and there is no evidence of any antagonism between Plumbers and Pipefitters Trust Fund’s interests and those of



the other members of the class. Further, Plumbers and Pipefitters Trust Fund has taken significant steps which demonstrate it will protect the interests of the class: it has retained competent and experienced counsel to prosecute these claims. In addition, as shown below, Plumbers and Pipefitters Trust Fund's proposed Lead Counsel is highly qualified, experienced and able to conduct this complex litigation in a professional manner. Thus, Plumbers and Pipefitters Trust Fund *prima facie* satisfies the commonality, typicality and adequacy requirements of Rule 23 for the purposes of this motion.

**B. The Court Should Approve Plumbers and Pipefitters Trust Fund's Choice of Counsel**

Pursuant to 15 U.S.C. §78u-4(a)(3)(B)(v), the proposed lead plaintiff shall, subject to Court approval, select and retain counsel to represent the class he seeks to represent. In that regard, Plumbers and Pipefitters Trust Fund has selected the law firm of Coughlin Stoia as Lead Counsel, a firm which has substantial experience in the prosecution of shareholder and securities class actions, including serving as lead counsel in *In re Enron Corp. Secs. Litig.*, No. H-01-3624 (MH), 2005 U.S. Dist. LEXIS 39867 (S.D. Tex. Dec. 22, 2005), in which Coughlin Stoia has obtained recoveries to date which represent the largest recovery ever obtained in a shareholder class action. *See* Alba Decl., Ex. D. Specifically, the court in *Enron* stated:

The firm is comprised of probably the most prominent securities class action attorneys in the country. It is not surprising that Defendants have not argued that counsel is not adequate. Counsel's conduct in zealously and efficiently prosecuting this litigation with commitment of substantial resources to that goal evidences those qualities is evident throughout this suit.

*In re Enron Corp. Sec. Derivative & "ERISA" Litig.*, No. H-01-3624 (MH), 2006 U.S. Dist. LEXIS 43146, at \*77 (S.D. Tex. June 5, 2006).

Accordingly, the Court should approve Plumbers and Pipefitters Trust Fund's selection of counsel.

#### IV. CONCLUSION

For all the foregoing reasons, Plumbers and Pipefitters Trust Fund respectfully requests that the Court: (i) appoint Plumbers and Pipefitters Trust Fund as Lead Plaintiff in the Action; (ii) approve its selection of Lead Counsel as set forth herein; and (iii) grant such other relief as the Court may deem just and proper.

DATED: June 30, 2008

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CERTIFICATE OF SERVICE

I hereby certify that on June 30, 2008, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the attached Electronic Mail Notice List, and I hereby certify that I have mailed the foregoing document or paper via the United States Postal Service to the non-CM/ECF participants indicated on the attached Manual Notice List.

s/ Mario Alba Jr.

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## Mailing Information for a Case 1:08-cv-04063-JGK

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### Manual Notice List

The following is the list of attorneys who are **not** on the list to receive e-mail notices for this case (who therefore require manual noticing). You may wish to use your mouse to select and copy this list into your word processing program in order to create notices or labels for these recipients.

- (No manual recipients)

ARBITRON

Service List - 6/30/2008 (08-0092)

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